No. 87-1028

FILED
MAY 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

BEECH AIRCRAFT CORPORATION AND
BEECH AEROSPACE SERVICES, INC.,

vs. *Petitioners,*

JOHN C. RAINEY,

Respondent,

BEECH AIRCRAFT CORPORATION AND
BEECH AEROSPACE SERVICES, INC.,

vs. *Petitioners,*

RONDI M. KNOWLTON,

Respondent.

**On Writ Of Certiorari To The
United States Court of Appeals
For The Eleventh Circuit**

ANSWER BRIEF OF RESPONDENTS JOHN C. RAINEY AND RONDI M. KNOWLTON

DENNIS K. LARRY
DONALD H. PARTINGTON
CLARK, PARTINGTON, HART, LARRY,
BOND, STACKHOUSE & STONE
125 West Romana Street
Post Office Box 13010
Pensacola, FL 32591-3010
(904) 434-9200

EDWARD R. CURTIS
McCUNE, HIAASEN, CRUM,
FERRIS & GARDNER
Post Office Box 14636
Fort Lauderdale, FL 33302
(305) 462-2000

Counsel for
John L. Rainey and Rondi M. Knowlton, Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

46 pp

QUESTIONS PRESENTED

1. Whether opinions and conclusions contained in NAVY JAG Reports should be admissible as "factual findings" under Federal Rule of Evidence 803(8)(C).

2. Whether the Eleventh Circuit En Banc correctly held under Federal Rules of Evidence 106 and 801(d)(1)(B) that the trial judge improperly restricted Rainey's testimony about portions of a letter he wrote while permitting the defendants to examine him about other portions of the same letter.

PARTIES TO PROCEEDINGS BELOW

All parties having an interest in the proceedings below are accurately set forth in Beech Aircraft's Brief.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
PARTIES TO PROCEEDINGS BELOW i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
STATEMENT OF JURISDICTION 1
STATUTORY PROVISIONS AT ISSUE 1
STATEMENT OF THE CASE 2
(A) Factual Background 2
(B) The JAG Report 5
(C) Cross-Examination of LCDR John Rainey 7
(D) Verdict and Appeals 9
SUMMARY OF ARGUMENT 10
ARGUMENT 13
I. The Supreme Court should construe Rule 803(8)(C) according to its plain meaning, and hold that the term "factual findings" does not encompass opinions and conclusions. 13
(A) *Smith v. Ithaca* is not an anomaly among the circuits. 14
(B) The legislative history of Rule 803(8)(C) compels a plain meaning construction 21
(C) The JAG Manual itself makes an express distinction between "factual findings" and "opinions and conclusions." 25

TABLE OF CONTENTS–Continued

Page

(D) *Weinstein's Evidence*, cited in support of the broader application of Rule 803(8)(C), suggests that there should be some limitation on the extent to which opinions may be admitted as "factual findings." 28
(E) It is unfair to admit into evidence a written opinion that goes to the heart of the jury issue, rather than offering the opinion through the witness himself 31
II. The Eleventh Circuit correctly held that, in permitting defendants to examine Rainey about portions of his letter to the JAG officer, the trial court erred when it prohibited cross-examination of Rainey about other relevant portions of the letter that would have harmonized the prior statements 33
CONCLUSION 36

TABLE OF AUTHORITIES

Page

CASES:

Baker v. Elcona Homes Corp., 588 F.2d 551 (6th Cir. 1978), *cert. denied*, 441 U.S. 933, 99 S. Ct. 2054, 60 L.Ed.2d 661 (1979) 20

Baz v. Walters, 782 F.2d 701 (7th Cir. 1986) 20

Bradford Trust Co. of Boston v. Merrill, Lynch, Pierce, Fenner & Smith, 805 F.2d 49 (2nd Cir. 1986) 19

Complaint of American Export Lines, Inc., 73 F.R.D. 454 (S.D.N.Y. 1977) 14, 19

Ellis v. International Playtex, Inc., 745 F.2d 292 (4th Cir. 1984) 20, 29

Franklin v. Skelly Oil Co., 141 F.2d 568 (10th Cir. 1944) 18

Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981) 17

Johnson v. Yellow Freight System, 734 F.2d 1304 (8th Cir. 1984) 21

Kehm v. Procter & Gamble Mfg. Co., 724 F.2d 613 (8th Cir. 1983) 21, 29

Koonce v. Quaker Safety Products & Mfg., 798 F.2d 700 (5th Cir. 1986) 15, 16, 17

Lindsay v. Ortho Pharmaceutical Corp., 637 F.2d 87 (2nd Cir. 1980) 18, 19

Litton Systems, Inc. v. American Telephone & Telegraph Co., 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984) 19

TABLE OF AUTHORITIES–Continued

Page

Lloyd v. American Export Lines, Inc., 580 F.2d 1179 (3d Cir. 1978), *cert. denied*, 439 U.S. 969, 99 S.Ct. 461, 58 L.Ed.2d 428 (1978) 19

Mac Towing, Inc. v. American Commercial Lines, 670 F.2d 543 (5th Cir. 1982) 16

McClure v. Mexia Independent School District, 750 F.2d 396 (5th Cir. 1985) 17

McQuaig v. McCoy, 806 F.2d 1298 (5th Cir. 1987) 15, 16, 17

Melville v. American Home Assurance Co., 584 F.2d 1306 (3d Cir. 1978) 19, 29

Muncie Aviation Corp. v. Party Doll Fleet, Inc., 519 F.2d 1178 (5th Cir. 1975) 16

Perrin v. Anderson, 784 F.2d 1040 (10th Cir. 1986) 21

Plummer v. Western International Hotels Co., Inc., 656 F.2d 502 (9th Cir. 1981) 21

Rainey v. Beech, 784 F.2d 1523 (11th Cir. 1986) .. 13, 36

Rainey v. Beech, 827 F.2d 1498 (11th Cir. 1987) 36

Robbins v. Whelan, 653 F.2d 47 (1st Cir. 1981) 17

Skogen v. Dow Chemical Company, 375 F.2d 692 (8th Cir. 1967) 29, 30

Smith v. Ithaca Corp., 612 F.2d 215 (5th Cir. 1980) ..... *passim*

Stissi v. Interstate and Ocean Transport Co. of Philadelphia, 765 F.2d 370 (2nd Cir. 1985) .. 18, 19

TABLE OF AUTHORITIES–Continued

Page

Tulloss v. Near North Montessori School, Inc., 776 F.2d 150 (7th Cir. 1985) 20

United States v. School District of Ferndale, 577 F.2d 1339 (6th Cir. 1978) 20

Zenith Radio Corp. v. Matsushita Electric Industrial Co., 505 F. Supp. 1125 (E.D. Pa. 1980), *aff'd in relevant part, rev'd in part*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) 20, 28

FEDERAL RULES OF EVIDENCE:

103(a)(2), Fed.R.Evid. 35

106, Fed.R.Evid. 1, 12, 34, 35

801(d)(2)(A), Fed.R.Evid. 36

801(d)(1)(B), Fed.R.Evid. ..... *passim*

803(6), Fed.R.Evid 14

803(8), Fed.R.Evid 1, 15

803(8)(C), Fed.R.Evid ..... *passim*

FLORIDA STATUTES:

§768.16-27, Fla.Stat. (1983) 3

OTHER AUTHORITIES:

4 J. Weinstein and M. Berger, *Weinstein's Evidence* §803(8)(C) (1985) 11, 28

TABLE OF AUTHORITIES–Continued

Page

Manual of the Judge Advocate General
Chapter II, §§0201, 0202, 0204 ..... 25, 26

Chapter VI, §§0601, 0605, 0608 ..... 11, 25, 26

Chapter IX, §0902 25

Report of the Committee on the Judiciary H.R. Rep. No. 93-650, 93rd Cong., 1st Sess. 14 (1973) 21

Report of the Committee on the Judiciary S. Rep. No. 93-1277, 93rd Cong., 2d Sess. 18 (1974) 22

U.S. Code Cong. & Admin. News (1974) ... 21, 22, 23

Websters New Collegiate Dictionary 776 (1980 ed.) 28

OPINIONS BELOW

The briefs of Beech Aircraft Corporation and Beech Aerospace Services, Inc. adequately set forth the Opinions Below.

STATEMENT OF JURISDICTION

The briefs of Beech Aircraft Corporation and Beech Aerospace Services, Inc. adequately set forth the Jurisdiction of this Court.

STATUTORY PROVISIONS AT ISSUE

1. *Federal Rule of Evidence 803. Hearsay Exceptions; Availability of Declarant Immaterial*, provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(8) Public records and reports. Records, reports, statements or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

2. *Federal Rule of Evidence 106.* Remainder of or Related Writings or Recorded Statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may

require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

3. *Federal Rule of Evidence 801. DEFINITIONS*, provides as follows:

(d) Statements which are not hearsay. A statement is not hearsay if –

(1) Prior Statement by witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

STATEMENT OF THE CASE

(A) Factual Background.

On July 13, 1982, LCDR Barbara Allen Rainey, a Naval instructor pilot, and her student, Ensign Donald Bruce Knowlton, were issued a Beech T-34C Turbo-Mentor aircraft BUNO 160955 (hereinafter "aircraft 955") for a training exercise that included "touch and go" exercises at Middleton Field, Alabama. While at Middleton their aircraft was one of five in the landing pattern, with one aircraft entering the pattern (Col. Habermacher) and one aircraft departing (Capt. Guthrie). At a time when Col. Habermacher had just entered the landing pattern, and following takeoff after a touch

and go, aircraft 955 crashed in close proximity to the airport.

John C. Rainey and Rondi M. Knowlton brought separate product liability actions as personal representatives of the estates of their spouses, pursuant to Florida's Wrongful Death Act, Fla. Stat. §768.16-27. They sued Beech Aircraft Corporation (hereinafter "Beech") as the manufacturer of the T-34C, Pratt & Whitney Canada, Ltd. (hereinafter "Pratt") as the manufacturer of the engine and Beech Aerospace Services, Inc. (hereinafter "BASI") as the company under contract with the Navy to perform aircraft maintenance at Whiting Field.

The plaintiffs alleged that the crash was caused by an in-flight loss of engine power known as a "rollback," caused by a defect in the design of the aircraft's pneumatic fuel control system. Beech, Pratt and BASI denied the allegations of defect, denied a "rollback" caused this crash, and alleged the cause was pilot error in stalling the aircraft in an avoidance maneuver occasioned by the pilots having failed to maintain proper interval in the touch and go landing pattern.

The fuel control system of aircraft 955 burned up in the crash. There were no survivors to testify to what happened. Thus whether aircraft 955 crashed by reason of a rollback/fuel control defect or by reason of pilot error was a matter of expert opinion based upon a large volume of evidence from which inferences supporting either theory could be drawn.

The testimony of virtually all of the eyewitnesses was presented to the jury, as was testimony from various Navy, Civil Service, Beech, Pratt and retained experts who performed post-crash analyses of the aircraft, engine, propeller and scene. Their testimony need not be recounted here. Suffice it to say, however, that the pivotal issue before the jury during two weeks of trial was whether 955 crashed because of rollback or because of pilot error in stalling the aircraft in an avoidance maneuver necessitated by failing to take proper interval on Col. Habermacher. That this was the pivotal issue is well illustrated by the parties' opening statements:

(Plaintiff's Opening)

> "So the experienced pilots will tell you that this aircraft would not have crashed, would not have stalled with power available, but the testimony will be that Barbara Rainey and Bruce Knowlton did not have power. They had a rollback." (Vol. 1 T. at 37)

(Beech's Opening)

> "Now, Mr. Larry has said to you that the airplane had an engine failure and that that was the cause of this tragedy. We think that that's not so, and we think the factual evidence will support our position." (Vol. 1 T. at 47)

> "Sad as it may be, lastly, I suggest to you that the pilots in this airplane simply stalled it." (Vol. 1 T. at 54)

There was testimony from various eyewitnesses, aviators and retained experts called by plaintiffs that aircraft 955 had developed a power problem. There was testimony from various Beech, Pratt and BASI witnesses and retained experts that aircraft 955 crashed

due to pilot error in stalling the aircraft in an avoidance maneuver necessitated by the failure to maintain proper interval. A complicated jury issue was presented as to the cause of 955's crash.

(B) The JAG Report.

In this context, the admissibility of the Judge Advocate General Investigator's opinion that pilot error was the most probable cause of the crash was of tremendous concern to the plaintiffs and defendants. Opinion 7 of the report stated: "The most probable cause of the accident was the pilot's failure to maintain proper interval." It would damage the plaintiffs' case and bolster the defendants' case. Offered only in writing, it would be the only official Navy opinion expressed at the trial and it would go to the central issue. It would be the only opinion expressed at the trial by any witness whose testimony, opinion, basis in fact, and qualifications were not subject to cross-examination.

The admissibility of the JAG Report's opinions was briefed and argued at the pretrial conference held on March 20, 1984. At that time, in a ruling later included in a written pre-trial order, the trial judge held that the JAG Report, while trustworthy, would be admitted at trial only as to its "factual findings," "and would not be admissible insofar as any opinions or conclusions are concerned." The court went on to say:

> With the parties' agreement, the defendants who wish to present this matter into evidence will, within ten days after date (of pretrial conference) provide the plaintiffs with excised portions of it

they wish to present. If plaintiffs are in disagreement, and the parties cannot reconcile their differences then both parties will report any differences to this court with each party providing a memorandum in support of its respective position so that ruling can be made, if at all possible, in advance of trial. (J.A. 35)

No defendant complied with the court's order. None submitted to plaintiffs within ten days following the pre-trial conference what, if any, portions they wanted admitted into evidence.

Nearly ninety days following the deadline set forth in the order, Beech submitted to plaintiff a letter notifying the plaintiffs it wanted the entire JAG Report in evidence.

On July 9, 1984, the parties selected a jury. In mid-afternoon of July 10th, the day before testimony began, the trial judge called counsel to Chambers to announce that he had reversed his prior ruling. The "opinions and conclusions" would, he ruled, be admitted into evidence over the plaintiffs' objection that:

(1) They were inadmissible under the law of this Circuit, *Smith vs. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980).

(2) The ruling, coming as it did hours before testimony was to begin, left the plaintiffs unprepared to attack the trustworthiness of the report, or the basis for the opinion. (J.A. 40-42)[1]

---

[1] Beech and BASI contend that plaintiffs conceded the trustworthiness of the JAG Report, but that is not correct and is misleading. The trustworthiness of the findings of fact

(Continued on following page)

The JAG opinion that pilot error was the most probable cause of the crash was admitted into evidence when offered by Beech. The report was enlarged by the defendants as an exhibit for use in final argument (Vol. 7, pp. 70-71) and the attorneys for Beech and BASI argued and referred to it during final argument (Vol. 7-182; 7-194).

(C) Cross-Examination of LCDR John Rainey.

As its first witness Beech called LCDR John Rainey as an adverse witness. (Vol. 5 T. at 60) Rainey's aviation experience, his investigation of the events surrounding the crash of his wife's plane and his knowledge of instructor piloting techniques was thoroughly established by Beech. (Vol. 5 T. at 60-77). That he had talked to most of the witnesses to the crash shortly after its occurrence was established. (Vol. 5 T. at 60-77). That he had with his squadron commander test flown what was thought to be the flight path and final maneuvers of aircraft 955 was also established. (Vol. 5 T. at 73; Shields Dep. 7-11).

These points having been established, Rainey was next examined about a letter that he had written to LCDR Morgan (the JAG investigator). The letter

---

(Continued from previous page)

was never questioned by plaintiffs, and until July 10, 1984 only the findings of fact, and not the opinions, were admissible by the court's ruling. When the trial judge reversed his ruling to admit the opinions, the plaintiffs expressed their concern for the trustworthiness of them. (J.A. 80-82). The trial began within hours and plaintiffs in fact did not produce evidence of untrustworthiness, but plaintiffs never agreed the opinions were trustworthy.

recited matters he had learned in his investigation and certain opinions he held.[2]

LCDR Rainey was asked if he had written that prior to his wife's flight she had tried to cancel it, and had acted in an "uncharacteristically heated and disgusted manner" when told the flight would not be canceled. Rainey admitted he had written that.

LCDR Rainey was then asked by Beech if in his letter he had made the following statement (the question was framed by reading verbatim from paragraph 4e. of his letter):

> Lt. Colonel Habermacher's plane came into view unexpectedly at its closest point of approach, although sufficient separation still existed between the aircraft. However, the unexpected proximity of Col. Habermacher's plane caused one of the aircrew in Mrs. Rainey's plane to react instinctively and abruptly by initiating a hard right turn away from Col. Habermacher's plane. (J.A. 75, 110, 111).

Rainey admitted he made that statement in the letter as well.

With Rainey's answer to this question Beech was able to leave the impression that Rainey had at one time held the opinion that aircraft 955 had made a voluntary, hard right turn/avoidance maneuver as a

---

[2] Though Beech and BASI in their briefs now characterize Rainey's statements as factual, at the in camera hearing Beech's counsel made it clear that he wanted to elicit "opinions" Mr. Rainey expressed in his letter, saying they were "opinions against his interest." (J.A. 44).

result of having failed to take proper interval on Col. Habermacher. Such an opinion would support Beech's pilot error theory and would represent an opinion contrary to the trial testimony his witnesses had just given during his case in chief.

Following Beech's examination of LCDR Rainey plaintiffs' counsel asked him about another opinion he expressed in the next paragraph of his letter, an opinion which demonstrated that Rainey was saying in his letter what his witnesses were saying at trial, that an engine problem caused the crash rather than an abrupt right rolling turn. (J.A. 77, 110, 111). The court sustained Beech's objection to plaintiffs' inquiry into that portion of the letter, though the question pertained to a statement made by Rainey in the same letter upon which he had been cross-examined by Beech, and though it would have placed in context the portions of the letter elicited from Rainey by Beech.

While deliberating the jurors requested that the testimony of one witness be read back to them by the court reporter, that of John Rainey, and it was so ordered by the court. (Vol. 8 T. at 27).

(D) Verdict and Appeals.

Following a two week trial on liability the jury returned a verdict for the defendants. The plaintiffs filed a motion for new trial which was denied on August 17, 1984. The Eleventh Circuit Panel reversed and remanded for a new trial, finding reversible error on two grounds: improper admission of the JAG opinions and undue restriction of Rainey's testimony concerning his letter to the JAG officer. The Eleventh Circuit

reheard the matter En Banc, and again reversed and remanded for a new trial. As to the admissibility of JAG Report opinion under Rule 803(8)(C), the 12-member court was evenly divided, thus leaving the panel opinion intact on that point. The En Banc court unanimously affirmed the panel's opinion that under Rules 106 and 801(d)(1)(B) Rainey's trial testimony had been improperly restricted, constituting prejudicial, reversible error.

SUMMARY OF ARGUMENT

I. *The Supreme Court should construe Rule 803(8)(C) according to its plain meaning and hold that the "factual findings" language of the Rule does not encompass opinions and conclusions.*

(1) The Fifth Circuit's plain meaning approach to defining the scope of Rule 803(8)(C)'s "factual findings" language, as set forth in *Smith vs. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980), is not an anomaly among the circuits. It is the same approach followed in the First, Second and (obviously) Eleventh Circuits, and represents the most logical and well reasoned approach to the Rule.

(2) The legislative history of Rule 803(8)(C) compels a plain meaning construction of "factual findings." Those Circuits that have defined *factual findings* to mean *opinions* have resorted to a fair degree of labored construction to get around the plain meaning of the words. Such an approach is unjustified in the absence of clear signals from the Legislature that this is what

was intended. The signals from the Legislature fall far short of the mark to justify construing the Rule other than according to its plain meaning. In fact, the legislative history strongly suggests that the House's construction of the rule emerged, in the end, as Congress' intent.

(3) The JAG Manual requires that an investigator separates his "factual findings" from his "opinions." The JAG Manual defines and distinguishes "factual findings" (the investigator's "evaluation of the evidence and information") from his "opinions" (which are to be the "logical inferences or conclusions which flow from the facts") JAG Manual Chapt. VI, §0608. Because the JAG investigator was required to separate his "findings of fact" from his "opinions," and he followed that mandate, only his "factual findings" should be admissible under the plain meaning of Rule 803(8)(C).

(4) The petitioners have relied upon the analysis of Rule 803(8)(C) contained in 4 J. Weinstein and M. Berger, *Weinstein's Evidence*, §803(8) [03] (1985) in support of their argument that the opinions contained in the Navy JAG Report were properly admitted. *Weinstein* suggests however that some limitation should be placed on the sort of opinions admissible as "factual findings," referring to the term "normative judgments" (a judgment based on authoritative standards). The opinions which were admitted here were more than simply "normative judgments."

(5) Fairness requires an approach to Rule 803(8)(C) that admits trusthworthy "factual findings" but not opinions and conclusions.

II. *The Eleventh Circuit correctly applied Federal Rules of Evidence 106 and 801(d)(1)(B), holding that the trial court, in permitting defendants to examine Rainey about portions of his letter, erred in prohibiting Rainey's testimony as to other parts of his letter that would have harmonized the letter with his trial stance.*

Beech was permitted to call LCDR Rainey as an adverse witness and elicit from him an opinion he had expressed in paragraph 2b. of his letter to the JAG officer concerning his wife's emotional status just prior to flight, and an opinion he expressed in paragraph 4e. of his letter that his wife or student had reacted instinctively and abruptly by initiating a hard right turn away from Col. Habermacher's plane, which had come into view unexpectedly. These opinions were elicited to support defendants' pilot error defense that such a maneuver would stall the T34C even with power available.

To place paragraphs 2 and 4 of his letter in context and overcome the impression that he had once held views consistent with Beech's theory of the case, Rainey's counsel asked him if he had also stated in paragraph 5 of the same letter that the most probable cause of the crash was rollback. (J.A. 77, 111). This would have placed paragraphs 2 and 4 in context, was necessary for the jury to receive a complete picture of the opinions and statements he made to the JAG officer, and would have been consistent with his trial stance and rebutted an implied charge that he had changed his views between the sending of the letter and the trial.

The Eleventh Circuit En Banc correctly held that under Rule 106, Beech had introduced a part of a writing through its questions of Rainey, and that when Rainey's counsel offered another part of the letter to be considered with it, in fairness it should have been permitted. The Eleventh Circuit also correctly held that under Rule 801(d)(1)(B) the statement contained in paragraph 5 of Rainey's letter was properly admissible as a statement made by him that was "consistent with his testimony (trial stance) and is offered to rebut an . . . implied charge against him of recent fabrication. . . ." 801(d)(1)(B), Fed.R.Evid.; *Rainey v. Beech*, 784 F.2d 1523 (11th Cir. 1986).

ARGUMENT

I.

The Supreme Court should construe Rule 803(8)(C) according to its plain meaning, and hold that the term "factual findings" does not encompass opinions and conclusions.

Federal Rule of Evidence 803(8)(C) (hereinafter "Rule 803(8)(C)") provides that as an exception to the hearsay rule that there shall be admissible in civil actions public reports setting forth "factual findings" resulting from an investigation made pursuant to authority granted by law, unless the circumstances indicate lack of trustworthiness.

The issue upon which this Court accepted conflict certiorari is whether Rule 803(8)(C) provides for the

admission of opinions and conclusions contained in reports prepared by public agencies. Stated another way the issue is whether the term "factual findings" is to be accorded its plain meaning and applied so as to exclude opinions or whether "factual findings" is to be construed beyond its plain meaning so as to admit opinions.

(A)

Smith v. Ithaca is not an anomaly among the circuits.

(1) The Fifth Circuit

Smith vs. Ithaca, 612 F.2d 215 (5th Cir. 1980), represents the foundation of the Eleventh Circuit's holding in *Rainey*. Beech and BASI incorrectly suggest *Smith* is no longer viable. We therefore begin our analysis of the Circuits with the Fifth Circuit.

Smith squarely and thoroughly examined whether to admit opinions and conclusions as "factual findings." It looked at 803(8)(C)'s legislative history. It examined the language of Rule 803(6) which, unlike 803(8)(C), expressly admits "opinions." The court then chose to construe the rule according to the literal, plain meaning of "factual findings":

> In deciding how to interpret 'factual findings' in the context of this case, we find instructive reasoning in *Complaint of American Export Lines, Inc.*, S.D.N.Y. 1977, 73 F.R.D. 454, concerning the admissibility of a Coast Guard Marine Board of Investigation Report at a civil trial. First, the language of Rule 803 suggests that 'factual findings' defines something other than 'opinions' and 'diagnoses' which are admissible under Rule 803(6)

> when contained in the records of 'a regularly conducted business activity'. *Id.* at 457. Rule 803(8), although similar to Rule 803(6), substitutes the term 'factual findings' for 'opinions' and 'diagnoses'. Since these terms are used in similar context within the same Rule, it is logical to assume that Congress intended that the terms have different and distinct meanings. *Id.* Second, Coast Guard regulations governing marine investigations expressly state that the investigations 'are for the purpose of taking appropriate measures for promoting of life and property at sea, and are *not intended to fix civil or criminal responsibility*.' 46 C.F.R. §4071(b) . . . . *Id.* at 458 (emphasis in original). *Smith*, 612 F.2d at 221, 222.

The Fifth Circuit held the findings of fact admissible, but excluded "opinions as to liability, conclusions as to the cause of the (vessel's) sinking, or recommendations regarding how to avoid similar disasters in the future." *Smith*, 612 F.2d at 222.

The Fifth Circuit as recently as 1987 has reaffirmed its holding in *Smith*. In *McQuaig vs. McCoy*, 806 F.2d 1298, 1302 (5th Cir. 1987), the Fifth Circuit held inadmissible evaluative opinions and conclusions contained in a police internal affairs report and, in so doing, expressly relied upon its holding in *Smith*. The *McQuaig* court also noted that its position, limiting admissibility to a report's factual parts, has been followed in the Eleventh and Second Circuits.

In *Koonce vs. Quaker Safety Products & Mfg.*, 798 F.2d 700, 720 (5th Cir. 1986), the Fifth Circuit excluded an Army Board of Inquiry memo setting forth opinions flowing from their investigation into a flashfire at an ammunition plant. The court excluded the report because what it set forth were not "characteristic of

'factual findings'," and because the report was untrustworthy. The *Smith* court's literal, plain meaning approach to "factual findings" was cited, discussed and expressly followed.[3]

BASI cites *Muncie Aviation Corp. vs. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir. 1975), and *Mac Towing vs. American Commercial Lines*, 670 F.2d 543 (5th Cir. 1982), as authority that the Fifth Circuit follows a "broad admissibility" versus a literal reading approach to "factual findings." BASI's reliance on these cases is misplaced. *Muncie* preceded *Smith* by five years, involved a case tried prior to the effective date of the Federal Rules of Evidence, and no where in the decision is there discussion of Rule 803(8)(C). *Mac Towing*, a 1982 case decided two years after *Smith*, makes no reference to *Smith*, no reference to Rule 803(8)(C), and relies upon a pre-Federal Rules case as authority for admitting the Coast Guard Report. And, any precedential weight *Mac Towing* might have been accorded has been overcome by *McQuaig* and *Koonce*.

It is thus clear that the Fifth Circuit still very much adheres to its holding in *Smith*. Moreover, in addition to its plain meaning approach being followed in the Eleventh Circuit, it is followed in the First and Second Circuits as well.

---

[3] There have been several Fifth Circuit opinions since *Smith* and prior to *McQuaig* and *Koonce*, holding EEOC

(Continued on following page)

(2) First Circuit

The First Circuit in *Robbins vs. Whelan*, 653 F.2d 47 (1st Cir. 1981), held that a DOT automotive brake performance report would be admissible under Rule 803(8)(C) because it was "factual" in nature. That it was the report's factual nature that made it admissible is evident:

> The vehicle safety performance report meets the *literal requirements* of Rule 803(8)(C). It is a data compilation of a public agency. The *findings* it sets fort are *purely factual*. . . . (Emphasis added.) *Robbins*, 653 F.2d at 50.

The First Circuit has thus made it clear that a "literal" reading of the "factual finding" language is required by Rule 803(8)(C).[4]

(Continued from previous page)

findings of reasonable cause are admissible. (See, e.g., *McClure vs. Mexia Independent School District*, 750 F.2d 396 (5th Cir. 1985); *Garcia vs. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert denied*, 449 U.S. 1113 (1981). Neither the *Garcia* nor the *McClure* decisions make any reference to *Smith*, nor do they make an effort to distinguish an accident investigation report's opinion on causation from an EEOC finding of reasonable cause. Furthermore, neither in *McQuaig* nor in *Koonce* did the Fifth Circuit cite or distinguish the *Garcia* and *McClure* EEOC cases that preceded them.

[4] Contrary to BASI's brief (p. 29), there is nothing in the opinion to indicate the First Circuit believed it was admitting evaluative conclusions of the DOT. In text as well as

(Continued on following page)

(3) The Second Circuit

In *Lindsay vs. Ortho,* 637 F.2d 87 (2nd Cir. 1980), the Second Circuit held that FDA labeling changes were in the nature of medical opinions and not facts, and were thus inadmissible under 803(8)(C). In so holding, the *Lindsay* court relied upon *Smith vs. Ithaca,* supra, and a pre-Federal Rules case, *Franklin vs. Skelly Oil Co.,* 141 F.2d 568 (10th Cir. 1944).

Lindsay was expressly re-affirmed and followed in 1985 by the Second Circuit in *Stissi vs. Interstate and Ocean Transport Co. of Philadelphia,* 765 F.2d 370 (2nd Cir. 1985). There the Second Circuit held, citing *Lindsay,* that "the district court did not abuse its discretion in redacting the . . . conclusory portions of the Coast Guard Report." *Stissi,* 755 F.2d at 376.[5]

The Fifth Circuit's approach to Rule 803(8)(C) is not an anomaly. It is still good law in the Fifth Circuit, and its construction of the Rule is the same approach followed in the First, Second, and Eleventh Circuits.

The other circuits that have considered this issue have followed a broad admissibility approach. In the interest of completeness we set forth a brief analysis of their rulings and the type report admitted in evidence.

(Continued from previous page)

footnote, the court emphasized that the data in the report consisted of objectively verifiable test results gathered through very precise and standardized testing methods.

[5] There are reported Second Circuit decisions post-*Lindsay* that have held admissible certain evaluative reports under 803(8)(C), but with no citation to and no effort to

(Continued on following page)

In most cases, it will appear that the opinions admitted were far more "normative" than that admitted in Rainey and Knowlton's trial.

(4) The Third Circuit

Initially the Third Circuit, in *Lloyd vs. American Export Lines,* 580 F.2d 1179 (3rd Cir. 1978), followed the literal, plain meaning approach to 803(8)(C), holding admissible a Coast Guard report's "factual findings." The *Lloyd* court cited with approval the same 803(8)(C) case relied upon by the Fifth Circuit in *Smith,* that of *Complaint of American Export Lines,* 73 F.R.D. 454 (S.D.N.Y. 1977), which held that evaluative conclusions or opinions contained in a Coast Guard Report would not be admissible, but that the "factual findings" would be.

Several months after *Lloyd* was decided the Third Circuit decided *Melville vs. American Home Assurance Co.,* 584 F.2d 1306 (3rd Cir. 1978). There it held admissible certain FAA airworthiness directives. Their admissibility was opposed as constituting opinion and hearsay. Making no reference to their decision in *Lloyd,* the court chose a different construction, following the Advisory Committee's "evaluative reports" approach. A

(Continued from previous page)

distinguish these cases from *Lindsay.* See, e.g., *Litton vs. AT&T,* 700 F.2d 785 (2nd Cir. 1983); *Bradford Trust Co. of Boston vs. Merrill, Lynch, Pierce, Fenner & Smith,* 805 F.2d 49 (2nd Cir. 1986). *Litton* admitted an FCC decision that AT&T's tariffs were unreasonable. *Bradford* held that an FBI report containing expert opinions as to the genuineness of a signature was admissible. *Litton* was decided prior to *Stissi* and *Bradford* was decided after *Stissi.*

similar result was obtained in *Zenith Radio Corp. vs. Matsushita Electric Industrial Co.*, 723 F.2d 238, 265 (3d Cir. 1983).

(5) The Fourth Circuit

There is one Fourth Circuit decision on this 803(8)(C) issue, *Ellis vs. International Platex, Inc.*, 745 F.2d 292 (4th Cir. 1984). It held, as to a Center for Disease Control statistical study with tentative conclusions, that the term "factual findings" is to be construed broadly to include evaluative reports.

(6) The Sixth Circuit

The Sixth Circuit has taken a broad admissiblity approach to "factual findings." In *U.S. vs. School District of Ferndale*, 577 F.2d 1339 (6th Cir. 1978), the Sixth Circuit held admissible an HEW finding that a black school was so maintained for segregation purposes. In *Baker vs. Elcona Homes*, 588 F.2d 551 (6th Cir. 1978), the court held admissible a police report, that an intersection light was red, was "distinctly a factual finding within the meaning of the rule, and certainly far more so than the HEW finding in *Ferndale*, which, we believe, is essentially an evaluative opinion resulting from the evidence." *Baker*, 588 F.2d at 557.

(7) The Seventh Circuit

The Seventh Circuit has addressed this issue in two cases in which EEOC findings of reasonable cause were admitted in a Title VII trial de novo. *Baz vs. Walters*, 782 F.2d 701 (7th Cir. 1986); *Tulloss vs. Near North Montessori School, Inc.*, 776 F.2d 150 (7th Cir. 1985).

(8) The Eighth Circuit

The Eighth Circuit has, like the Fourth Circuit in *Ellis*, held CDC studies admissible. *Kehm vs. Proctor & Gamble Mfg. Co.*, 724 F.2d 613 (8th Cir. 1983). As well, EEOC findings of reasonable cause are admissible in the Eighth Circuit. *Johnson vs. Yellow Freight System*, 734 F.2d 1304 (8th Cir. 1984).

(9) The Ninth Circuit

The Ninth Circuit has held EEOC findings of reasonable cause admissible in a Title VII trial de novo. *Plummer vs. Western International Hotels Company, Inc.*, 656 F.2d 502 (9th Cir. 1981).

(10) The Tenth Circuit

The Tenth Circuit in *Perrin vs. Anderson*, 784 F.2d 1040 (10th Cir. 1986), held admissible a police internal investigation report that contained conclusions concerning the propriety of a police officer's conduct.

(B)

The legislative history of Rule 803(8)(C) compels a plain meaning construction.

Much judicial comment has centered around the differing House and Senate Judicial Committee views on the construction to be placed on the "factual findings" language of Rule 803(8)(C). The House Committee's stated intention was that "the phrase 'factual findings' in subdivision (c) be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule." *Report of the Committee on the Judiciary*, H.R. Rep. No. 93-650, 93rd Cong., 1st Sess. 14 (1973) *reprinted in* 1974 U.S. Code

Cong. & Admin. News 7064. The Senate Committee took "strong exception to this limiting understanding of the application of the rule," saying they did not think it reflected an "understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection." *Report of the Committee on the Judiciary*, S. Rep. No. 93-1277, 93rd Cong., 2d Sess. 18 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 7064. Because respondents believe greater weight should be placed on the House's stated intention, a thorough look at the development of the Rules of Evidence is important.

The Federal Rules of Evidence originated from a draft prepared by an Advisory Committee appointed by the United States Supreme Court. When the Advisory Committee's work was finished and forwarded to the Supreme Court, the Court then entered an order that promulgated the Federal Rules of Evidence and, on February 5, 1973, transmitted the proposed rules to Congress. 1974 U.S. Code Cong. & Admin. News, at 7077.

Because Congress recognized the "importance and the enormity of the task before it, and in light of the serious question raised by Mr. Justice Douglas, in dissenting to the Supreme Court Order, as to the authority of the Supreme Court to promulgate rules of evidence," Congress enacted Public Law 93-12, which provided the Rules would not be effective until expressly approved by Congress. 1974 U.S. Code Cong. & Admin. News, at 7077.

Hearings on the rules began on February 7, 1973, before the House Judiciary Sub-Committee on Criminal Justice. The proposed Rules were placed before the sub-committee in legislative form as House Bill H.R. 5463. On the opening day of hearings, the Judicial Conference Chairman on Rules of Practice and Procedure, Judge Albert B. Maris, testified that the adoption of the Federal Rules of Evidence would provide "*clear, precise* . . . rules for trial judges and trial lawyers to follow," which would be "*uniformly applicable* throughout the Federal judicial system." (Emphasis added.) 1974 U.S. Code Cong. & Admin. News, at 7075.

Six days of hearings were held, a volume of written comments was received and a 600-page hearing record was compiled. Between March 21st and June 22nd, 1973, the sub-committee held 17 markup sessions out of which emerged on June 28, 1973, a Committee Print of H.R. 5463. The Print was circulated nationwide for comment and printed in the Congressional Record. Over the following six weeks 90 written commentaries were received from interested people and organizations. "Chief Judge Friendly wrote ' . . . if there are to be Federal rules of evidence, I do not see how there could be much better ones than your Subcommittee has proposed'." Five more markup sessions followed. The final Committee Print was, with some further amendments, approved by the sub-committee on October 10, 1973. Following debate, the full House Judiciary Committee ordered H.R. 5463 favorably reported. 1974 U.S. Code Cong. & Admin. News, at 7077, 7078.

It was following this thorough amendment process that the House Judiciary made it clear that the phrase

"factual findings" should be strictly construed and that "evaluations or opinions in public reports shall not be admissible." Taking into account the thoroughness of the House's review process prior to transmitting the rules to the Senate, it cannot be seriously contended that the House Judiciary Committee either misunderstood or overlooked what the Advisory Committee intended to be the meaning of "factual findings."

The House quite obviously studied and understood the Advisory Committee's notes and expressly rejected a "broad admissibility" approach to the Rule. It cannot be ignored that the Rules ultimately took the form of a House Bill. The House Sub-Committee and the Full Committee concluded that the Supreme Court did not have the authority to promulgate the Rules, and H.R. 5463 was a demonstration of that view as well as a demonstration of the "view as to what should be the content and scope of a uniform code of evidence." 1974 U.S. Code Cong. & Admin. News, at 7076. It should also be noted that the House amended close to fifty percent of the rules, but left the language of Rule 803(8)(C) intact, disagreeing not with the Rule, but the Advisory Committee's comment to it.

Had the Senate insisted that their approach to "factual findings" be part of the Rule, the wording of the Rule should have been amended to add the words "opinions and conclusions." Leaving those words out is a significant omission when considered in light of the plain meaning ordinarily of the words "factual findings" and the express intent of the House. The Federal Rules

of Evidence were ultimately codified by Congress' passage of the rules as a House Bill. H.R. 5463 was thoroughly studied. Many changes were made before the bill left the House. A 600-page record was gathered. There were 22 mark-up sessions and several re-drafts. When the Rules left the House Judiciary Committee they were clarified with a statement of intent in the clearest possible terms – "that the phrase 'factual findings' in subdivision (c) be strictly construed and that evaluations or opinions shall not be admissible. . . ." The Senate took exception, by way of comment, to the House's strict approach, but made no amendment. As a House Bill, unchanged by the Senate, the House's intent should be accorded significant weight.

(C)

The JAG Manual itself makes an express distinction between "factual findings" and "opinions and conclusions."

(1) Nature of the JAG investigation.

Pursuant to the authority of the JAG Manual, Chapters VI and IX, LCDR Morgan was appointed by his squadron commander to perform an informal, one-man JAG Manual investigation into the circumstances connected with the aircraft crash killing LCDR Rainey and Ensign Knowlton. (JA 141,142) A "JAG Manual Investigation" is an administrative fact-finding body, and may include (as it did here) single individuals functioning as an informal fact-finding body. JAG MAN 0201 a. (1) and (2); 0601.

The investigation's purpose is to provide military convening and reviewing authorities with adequate information upon which to base decisions. Specific purposes to be served include: (1) efficient command or administration of the fleet; (2) proper disposition of claims for or against the government; (3) redress of property damage, and (4) administrative determinations regarding military personnel. JAG MAN 0202 b., c., d. and e. The JAG MANUAL does not state anywhere that the investigation is intended to fix civil or criminal responsibility.

The report is purely advisory. The opinions of the investigator do not constitute final determinations or legal judgments. JAG MAN 0201c. The investigation may be conducted by any officer, enlisted person or mature civilian employee. JAG MAN 0601. There is no requirement that the investigator have any experience in accident investigation, or have any particular skills for ascertaining the cause of the accident that he is to investigate. The investigator is not required to take statements from witnesses under oath, JAG MAN 0204 d. (1)-(6), and he "may employ any method which (he) finds most efficient and effective in performing (his) investigative function." JAG MAN 0605.

(2) Nature of the report.

The JAG Manual Investigation Report must contain four parts, including separately designated "Findings of Fact" and "Opinions." JAG MAN 0608 a., b., c., d., e. What is meant be the term *"findings of fact"* is clearly described in the Manual:

> The findings of fact represent the evaluation of the evidence and information received and collected. These findings must be as specific as possible as to time, places, persons, and events. JAG MAN 0608 c.

What is meant by the term *"opinions"* is also clearly described in the Manual:

> Opinions are the logical inferences or conclusions which flow from the facts. The Investigation will express its opinions when directed to do so by the convening authority. JAG MAN 0608 d.

It is quite apparent that the Navy Judge Advocate General draws an easy distinction between *"findings of fact,"* representing the investigator's *evaluation of the evidence*, and *"opinions,"* which are the *logical conclusions that flow from the facts*. The investigator was required by his commander in his letter of appointment and by the provisions of the JAG Manual to make separate "findings of fact" and "separate opinions." LCDR Morgan did that. He set them forth in his Report. There was no mistake in his mind or in his report as to what was factual and what was opinion.

This Court needs to decide the issue presented here in the context of the Navy JAG Report prepared pursuant to the requirements outlined above, and should hold that when a JAG Report's author separately sets forth what is factual and what is opinion, Rule 803(8)(C) compels the exclusion of his opinions.

(D)

***Weinstein's Evidence*, cited in support of the broader application of Rule 803(8)(C), suggests that there should be some limitation on the extent to which opinions may be admitted as "factual findings."**

The petitioners have relied upon *Weinstein's Evidence*, supra, in support of the "broad admissibility" approach to Rule 803(8)(C). But even *Weinstein* suggests that there should be some limitation on the extent to which opinions may be admitted as findings of fact. In its discussion of Rule 803(8)(C), the treatise contains a discussion of the extent to which courts have sanctioned the admission of opinions under the definition of "factual findings." The treatise advocates that "[i]f the report states a conclusion that would be helpful – and is reliable – it should be admitted." Vol. 4, p. 803-251. *Weinstein* also quotes with approval the opinion of a District Judge who, after an extensive review of the Rule 803(8)(C) cases, stated it is now generally accepted that "evaluative reports of public agencies (i.e., those rendering *normative* judgments or opinions, not just reciting facts) are admissible."[6] Even if some "opinion" may be admissible under the more liberal view embraced by the majority, *Weinstein* indicates that limits should be placed on it. That is, only evaluative reports reciting "normative judgments or opinions" should be admissible under Rule 803(8)(C), if indeed evaluative reports should be admissible at all.

---

[6] Citing *Zenith Radio Corporation v. Matsushita Electric Industries Co., Ltd.*, 505 F.Supp. 1125 (E.D. Pa. 1980).

A norm is an authoritative standard. *Websters New Collegiate Dictionary*, 776, 1980 Edition. Normative conclusions are therefore reasoned judgments or inferences that relate to or conform to authoritative standards.

Rainey and Knowlton respectfully suggest to the Court that an aviation accident probable cause opinion, which must take into account turbine engine expertise, propeller blade angle expertise, aerodynamics and a vast amount of circumstantial evidence is far more than a "normative conclusion." It is also far from being an opinion of a type "all persons skilled in the art would likely reach," nor is it a conclusion "based upon directly observable facts or well-known tests."[7] The CDC studies admitted in *Ellis* and *Kehm* and the FAA airworthiness directives admitted in *Melville* are perhaps better examples of "normative conclusions," better examples of opinions all similarly skilled persons would more likely reach, and better examples of conclusions grounded on established tests or directly observed facts.

---

[7] *Skogen v. Dow Chemical Company*, 375 F.2d 692, 705 (8th Cir. 1967). This pre-federal evidence rules case involved the admission of expert opinion contained in a business record. The court recognized that such records may, of necessity, contain some basic conclusions, but that there is a point at which expert and non-expert opinion evidence as to the critical issues of causation will be objectionable. Holding that the conclusion of causation contained in the hospital records was inadmissible, the court stated:

> This conclusion of causation is not one that all persons skilled in the art would likely reach. [Citations omitted throughout.] It is a conclusion not based upon directly

(Continued on following page)

Even if this Court should find that evaluative reports (rendering normative conclusions) should be admissible under Rule 803(8)(C), official reports should not become a vehicle for admission into evidence of *every* opinion as a "finding of fact." Opinions that go *beyond* those based upon directly observable facts or well known tests, and *beyond* being a conclusion that all persons skilled in the art would likely reach, the opinions should be inadmissible as being too far removed from what could fairly be characterized as a "factual finding." Such opinions, particularly those in complicated cases going to the very issue the jury must decide, can become a substitute for the jury's decision

---

(Continued from previous page)

observable facts or well-known tests. Of necessity it is *purely the conclusion of one man*, based upon an evaluation judgment which *he alone* placed upon a number of variable factors and which he was not obligated by law to make. In this case, the party making the conclusionary statement was not shown to be unavailable to testify. *If plaintiffs desired the jury to have the benefit of this expert conclusion, they should have called the person who made it, properly qualified him as an expert, and have him so testify in front of the jury.* Otherwise, under both Minnesota and Federal practice, this expert opinion is inadmissible hearsay. We do not believe plaintiffs should be allowed to present to the jury this otherwise inadmissible conclusion as to the cause of plaintiffs' condition *simply because it fortuitously appears in a hospital record, and thereby deny to defendants the protection afforded by an oath and the opportunity to cross-examine the witness.* This type of conclusion on the highly controversial ultimate issue of the cause of the plaintiffs' condition does not qualify as an entry made 'in the regular course of *** business' and is consequently inadmissible. (Emphasis added.) *Skogen*, 375 F.2d at 705.

and become, therefore, helpful only to the party offering the opinion. The jury does not *need* and should not be given such "help" from authors of governmental reports who are not even present at trial to testify and be cross-examined. It is the litigants themselves who can and should bring to the courtroom the expert testimony needed for their respective cases.

(E)

It is unfair to admit into evidence a written opinion that goes to the heart of the jury issue, rather than offering the opinion through the witness himself.

The trial of this case in the District Court below was lengthy and complicated. Naval and civilian aviators and turbine engine experts as well as aerodynamicists and variable-pitch propeller experts offered opinion testimony going to the pivotal issue – whether Aircraft 955 crashed due to a fuel control system design defect-induced "rollback," or due to pilot error in inadvertently stalling the aircraft in a surprised turn-reaction to another aircraft in the landing pattern. There was a very real and hotly contested jury issue presented on this issue of causation.

Within this context the trial court admitted the Navy JAG Report and opinion as to the most probable cause of the crash of 955. It came in only in writing; it came in though Rainey and Knowlton had been assured in a written pre-trial order that it would *not* come in. It came in and was enlarged to a "larger than life" demonstrative exhibit that carried the prestige and authority embodied in the office of the Judge Advocate General's office.

The opinion was that, in the context of this lawsuit, pilot error not engine defect caused 955's crash. It was admitted following a reversal by the trial court of its pre-trial ruling, announced hours before the trial was to begin. The opinion gave authoritative, credible support to Beech and BASI's pilot error defense, and it came in without any realistic opportunity to locate, subpoena and cross-examine its author.

If each side of such a controversy has at its disposal the resources to adequately prove its case and to give the jury the evidence it requires to make its decision, why should an official government probable cause opinion be shown to them? How is the jury to evaluate the evidence for themselves and reach an objective, independent, fair and impartial verdict based on the evidence? How does a jury learn whether there may be some fundamental weakness in the opinion on the ultimate issue without hearing its author cross-examined by opposing counsel? Rainey and Knowlton respectfully suggest that these questions answer themselves. The bottom line is that when a party is permitted to offer into evidence a written opinion on the ultimate jury issue prepared by a governmental officer, that party is given unfair advantage in the litigation.

II.

The Eleventh Circuit correctly held that, in permitting defendants to examine Rainey about portions of his letter to the JAG officer, the trial court erred when it prohibited cross-examination of Rainey about other relevant portions of the letter that would have harmonized the prior statements.

Beech, calling Rainey first as an adverse witness, questioned him about a letter he had written to the Naval officer who authored the JAG report. Reading portions of paragraphs 2 and 4 of his letter into the record, Beech asked Rainey if he had made the statements. He acknowledged them. These statements read alone supported Beech's pilot error defense. Rainey's attorney then asked him if he had made, in paragraph 5 of the same letter, the statement that the most probable cause of this mishap was rollback (engine defect). Paragraphs 2 and 4 by themselves appeared *inconsistent* with Rainey's trial theory presented during his case in chief. Paragraph 5 was *consistent* with his trial stance. The trial judge refused to allow Rainey to introduce his statement from paragraph 5 of his letter because it was opinion of a non-expert. Counsel attempted to persuade the trial judge to admit Rainey's testimony on the basis that Beech had been allowed to put other portions of the letter in. The court sustained Beech's objections. (J.A. 77, 78).

By way of introduction to this issue factual adjustments must be made to the Beech and BASI briefs on the issue of Rainey's examination. Beech's characterization of the parts of the letter *they* introduced through

Rainey as "factual" and their characterization of the parts Rainey wanted introduced as "opinion" is not only false, but irrelevant to the admissibility question either under Rule 106 or Rule 801(d)(1)(B). It is true Rainey was asked by his attorney about an opinion he expressed in paragraph 5 of the letter. It is also true that Rainey was asked by Beech about opinions he expressed in paragraphs 2 and 4 of the letter. Not only did Beech characterize them to the court as "opinions" (J.A. 43, 44), but it is obvious from the content of those paragraphs that Beech asked Rainey about "opinions" he had expressed (J.A. 75, 111).

The Eleventh Circuit correctly ruled that the refusal to admit the testimony of Rainey as to paragraph 5 was reversible error:

> Because paragraph five of the letter would have harmonized the prior statements with Rainey's stance at trial, the jury was given an incomplete and misleading impression of Rainey's position. Under the "rule of completeness" embodied in Rule 106, the limitation of Rainey's testimony was thus inherently unfair and an abuse of discretion. Rainey and Knowlton are entitled to a new trial. *Rainey v. Beech,* supra (J.A. 131, 132).

The Eleventh Circuit also agreed that Rule 801(d)(1)(B) permitted the admission of Rainey's prior consistent statements to rebut the implied or express charge that in other parts of his letter he had made statements inconsistent with his trial stance.

Rule 106 permits introduction of other parts of a writing when portions of it have been introduced by a party, when in fairness those other parts ought to be considered. The Eleventh Circuit felt that paragraph 5

of Rainey's letter needed to be considered, in fairness, with the statements he made in paragraphs 2 and 4. Petitioners argue that Rule 106 is inapplicable here because there was "no effort by counsel for Mr. Rainey to offer into evidence the rest of the letter." As the Eleventh Circuit noted in footnote 10 of its panel opinion, while an "offer of proof " was not made, such is not required if the substance of the evidence is apparent from the context of the question. Fed.R.Evid. 103(a)(2). Moreover, Rainey's counsel attempted to offer paragraph 5 into evidence in the same fashion Beech offered paragraphs 2b. and 4e. – by a verbatim reading from the letter by counsel when the question was framed. Rule 106 clearly required admitting Rainey's testimony.

When Rainey took the stand, called by Beech as its first witness, the jury had just heard a week's testimony from Rainey's witnesses that a defect in the fuel control system – rollback – had caused his wife's aircraft to rapidly stall and crash. Beech then used selected parts of Rainey's letter to show that he had made statements well prior to the trial that, read alone, suggested he had once held views different from what his witnesses were saying at trial. While Rainey may not have made, at the trial himself, a prior inconsistent statement, the entire case he had just presented was inconsistent with the inference drawn from paragraphs 2 and 4 of his letter. This is a situation that Rule 801(d)(1)(B) was intended to correct. Paragraph 5 of his letter was *expressly consistent* with his entire case in chief, and not allowing it in denied Rainey an opportunity to rebut an implied charge that his entire case in

chief was a recent fabrication and inconsistent with his earlier letter.

CONCLUSION

The United States Supreme Court should construe Rule 803(8)(C) according to its plain, common sense meaning and hold that the term "factual findings" does not encompass, and the Rule does not allow, admission of opinions. The Rule's legislative history, and particularly the history of the Bill as it emerged from the House with their construction carefully explained in a comment, compels a plain meaning approach. Where, as here, the authority of law (JAG Manual) and the report authorized by the law expressly define and designate what is a "factual finding" and what is an "opinion," Rule 803(8)(C) must be limited in scope so as to allow only the report's "factual findings." The Eleventh Circuit's holding in this case should accordingly be affirmed.

The Eleventh Circuit's unanimous En Banc opinion was entirely correct that Rule 106 requires reversal for limiting Rainey's testimony. It is a clear example of a party obtaining an unfair advantage by offering only parts of a letter, which thereby creates a misleading impression. The panel was also correct in its reversal under Rule 801(d)(2)(A) because paragraph 5 of Rainey's letter was admissible as a prior consistent statement made by him offered to rebut an express or

implied charge that in other parts of the letter he had made statements inconsistent with his trial theory.

Respectfully submitted,

DENNIS K. LARRY
DONALD H. PARTINGTON
CLARK, PARTINGTON, HART, LARRY, BOND, STACKHOUSE & STONE
125 West Romana Street
Post Office Box 13010
Pensacola, FL 32591-3010
(904) 434-9200

EDWARD R. CURTIS
McCUNE, HIAASEN, CRUM, FERRIS & GARDNER
Post Office Box 14636
Fort Lauderdale, FL 33302
(305) 462-2000

Counsel for
John L. Rainey and Rondi M. Knowlton, Respondents